

APPENDIX A

CANADIAN RIVER COMPACT

The State of New Mexico, the State of Texas, and the State of Oklahoma, acting through their Commissioners, John H. Bliss for the State of New Mexico, E. V. Spence for the State of Texas, and Clarence Burch for the State of Oklahoma, after negotiations participated in by Berkeley Johnson, appointed by the President as the representative of the United States of America, have agreed respecting Canadian River as follows:

ARTICLE I

The major purposes of this Compact are to promote interstate comity; to remove causes of present and future controversy; to make secure and protect present developments within the States; and to provide for the construction of additional works for the conservation of the waters of Canadian River.

ARTICLE II

As used in this Compact:

(a) The term "Canadian River" means the tributary of Arkansas River which rises in northeastern New Mexico and flows in an easterly direction through New Mexico, Texas and Oklahoma and includes North Canadian River and all other tributaries of said Canadian River.

(b) The term "North Canadian River" means that major tributary of Canadian River officially known as North Canadian River from its source to its junction with Canadian River and includes all tributaries of North Canadian River.

(c) The term "Commission" means the agency created by this Compact for the administration thereof.

(d) The term "conservation storage" means that portion of the capacity of reservoirs available for the storage of water for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them, and it excludes any portion of the capacity of reservoirs allocated solely to flood control, power production and sediment control, or any of them.

ARTICLE III

All rights to any of the waters of Canadian River which have been perfected by beneficial use are hereby recognized and affirmed.

ARTICLE IV

(a) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam.

(b) New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River in New Mexico below Conchas Dam, provided that the amount of conservation storage in New Mexico available for impounding these waters which originate in the drainage basin of Canadian River below Conchas Dam shall be limited to an aggregate of two hundred thousand (200,000) acre-feet.

(c) The right of New Mexico to provide conservation storage in the drainage basin of North Canadian River shall be limited to the storage of such water as at the time may be unappropriated under the laws of New Mexico and of Oklahoma.

ARTICLE V

Texas shall have free and unrestricted use of all waters of Canadian River in Texas, subject to the limitations upon storage of water set forth below:

(a) The right of Texas to impound any of the waters of North Canadian River shall be limited to storage on tributaries of said River in Texas for municipal uses, for household and domestic uses, livestock watering, and the irrigation of lands which are cultivated solely for the purpose of providing food and feed for the householders and domestic livestock actually living or kept on the property.

(b) Until more than three hundred thousand (300,000) acre-feet of conservation storage shall be provided in Oklahoma, exclusive of reservoirs in the drainage basin of North Canadian River and exclusive of reservoirs in the drainage basin of Canadian River east of the 97th meridian, the right of Texas to retain water in conservation storage, exclusive of waters of North Canadian River, shall be limited to five hundred thousand (500,000) acre-feet; thereafter the right of Texas to impound and retain such waters in storage shall be limited to an aggregate quantity equal to two hundred thousand (200,000) acre-feet plus whatever amount of water shall be at the same time in conservation storage in reservoirs in the drainage basin of Canadian River in Oklahoma, exclusive of reservoirs in the drainage basin of North Canadian River and exclusive of reservoirs east of the 97th meridian; and for the purpose of determining the amount of water in conservation storage, the maximum quantity of water in storage following each flood or series of floods shall be used; provided, that the right of Texas to retain and use any quantity of water previously impounded shall not be reduced by any subsequent application of the provisions of this paragraph (b).

(c) Should Texas for any reason impound any amount of water greater than the aggregate quantity

specified in paragraph (b) of this Article, such excess shall be retained in storage until under the provisions of said paragraph Texas shall become entitled to its use; provided, that, in event of spill from conservation storage, any such excess shall be reduced by the amount of such spill from the most easterly reservoir on Canadian River in Texas; provided further, that all such excess quantities in storage shall be reduced monthly to compensate for reservoir losses in proportion to the total amount of water in the reservoir or reservoirs in which such excess water is being held; and provided further that on demand by the Commissioner for Oklahoma the remainder of any such excess quantity of water in storage shall be released into the channel of Canadian River at the greatest rate practicable.

ARTICLE VI

Oklahoma shall have free and unrestricted use of all waters of Canadian River in Oklahoma.

ARTICLE VII

The Commission may permit New Mexico to impound more water than the amount set forth in Article IV and may permit Texas to impound more water than the amount set forth in Article V; provided, that no State shall thereby be deprived of water needed for beneficial use; provided further that each such permission shall be for a limited period not exceeding twelve (12) months; and provided further than no State or user of water within any State shall thereby acquire any right to the continued use of any such quantity of water so permitted to be impounded.

ARTICLE VIII

Each State shall furnish to the Commission at intervals designated by the Commission accurate records of the quantities of water stored in reservoirs pertinent to the administration of this Compact.

ARTICLE IX

(a) There is hereby created an interstate administrative agency to be known as the "Canadian River Commission." The Commission shall be composed of three (3) Commissioners, one (1) from each of the signatory States, designated or appointed in accordance with the laws of each such State, and if designated by the President an additional Commissioner representing the United States. The President is hereby requested to designate such a Commissioner. If so designated, the Commissioner representing the United States shall be the presiding officer of the Commission, but shall not have the right to vote in any of the deliberations of the Commission. All members of the Commission must be present to constitute a quorum. A unanimous vote of the Commissioners for the three (3) signatory States shall be necessary to all actions taken by the Commission.

(b) The salaries and personal expenses of each Commissioner shall be paid by the government which he represents. All other expenses which are incurred by the Commission incident to the administration of this Compact and which are not paid by the United States shall be borne equally by the three (3) States and be paid by the Commission out of a revolving fund hereby created to be known as the "Canadian River Revolving Fund." Such fund shall be initiated and maintained by equal payments of each State into the fund in such amounts as will be necessary for administration of this Compact. Disbursements shall be made from said fund in such manner as may be authorized by the Commission. Said fund shall not be subject to the audit and accounting procedures of the States. However, all receipts and disbursements of funds handled by the Commission shall be audited by a qualified independent public accountant at regular intervals and the report of the audit shall be included in and become a part of the annual report of the Commission.

(c) The Commission may:

- (1) Employ such engineering, legal, clerical, and other personnel as in its judgment may be necessary for the performance of its functions under this Compact;
- (2) Enter into contracts with appropriate Federal agencies for the collection, correlation, and presentation of factual data, for the maintenance of records, and for the preparation of reports;
- (3) Perform all functions required of it by this Compact and do all things necessary, proper, or convenient in the performance of its duties hereunder, independently or in cooperation with appropriate governmental agencies.

(d) The Commission shall:

- (1) Cause to be established, maintained and operated such stream and other gaging stations and evaporation stations as may from time to time be necessary for proper administration of the Compact, independently or in cooperation with appropriate governmental agencies;
- (2) Make and transmit to the Governors of the signatory States on or before the last day of March of each year, a report covering the activities of the Commission for the preceding year;
- (3) Make available to the Governor of any signatory state, on his request, any information within its possession at any time, and shall always provide access to its records by the Governors of the States, or their representatives, or by authorized representatives of the United States.

ARTICLE X

Nothing in this Compact shall be construed as:

(a) Affecting the obligations of the United States to the Indian Tribes;

(b) Subjecting any property of the United States, its agencies or instrumentalities, to taxation by any State or subdivision thereof, or creating any obligation on the part of the United States, its agencies or instrumentalities, by reason of the acquisition, construction or operation of any property or works of whatever kind, to make any payment to any State or political subdivision thereof, state agency, municipality or entity whatsoever, in reimbursement for the loss of taxes;

(c) Subjecting any property of the United States, its agencies or instrumentalities, to the laws of any State to an extent other than the extent to which such laws would apply without regard to this Compact;

(d) Applying to, or interfering with, the right or power of any signatory State to regulate within its boundaries the appropriation, use and control of water, not inconsistent with its obligations under this Compact;

(e) Establishing any general principle or precedent applicable to other interstate streams.

ARTICLE XI

This Compact shall become binding and obligatory when it shall have been ratified by the Legislature of each State and approved by the Congress of the United States. Notice of ratification by the Legislature of each State shall be given by the Governor of that State to the Governors of the other States and to the President of the United States.

The President is hereby requested to give notice to the Governor of each State of approval by the Congress of the United States.

IN WITNESS WHEREOF, The Commissioners have executed four (4) counterparts hereof, each of which shall be and constitute an original, one (1) of which shall be deposited in the archives of the Department of State of the United States, and (1) of which shall be forwarded to the Governor of each State.

DONE at the City of Santa Fe, State of New Mexico, this 6th day of December, 1950.

/s/ John H. Bliss

John H. Bliss
Commissioner for the
State of New Mexico

/s/ E. V. Spence

E. V. Spence
Commissioner for the
State of Texas

/s/ Clarence Burch

Clarence Burch
Commissioner for the
State of Oklahoma

APPROVED:

/s/ Berkeley Johnson

Berkeley Johnson
Representative of the
United States of America

APPENDIX B

APPENDIX B

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS,)	
)	
Petitioner,)	No. 105, Original
)	October Term, 1985
v.)	
)	
STATE OF COLORADO,)	
)	
Respondent.)	
)	

DECISION OF SPECIAL MASTER
ON COLORADO MOTION TO STAY

Colorado filed a Motion to Stay Based on Kansas' Failure to Exhaust Its Administrative Remedies. The Motion dealt with two of the several issues in the Complaint: i.e., post-Compact well development in Colorado, and the operation of Trinidad Reservoir. The Motion was fully briefed, and oral argument was held in the Federal Court of Appeal in Pasadena, California on September 28, 1988. David W. Robbins, Esq. argued the Motion for Colorado, and Richard A. Simms responded for Kansas.

Kansas acknowledges that it has an obligation, before seeking judicial relief, to exhaust its administrative remedies under the Arkansas River Compact. The Compact was ratified by the respective legislatures of each state, and approved by Congress in 1949. (Act of May 31, 1949, 63 Stat. 145) The Compact Administration is similar to that discussed in *State of Texas vs. State of New Mexico* (1983) 462 U.S. 554, 77 L.Ed.2d 1; 103 S.Ct. 2558. The Administration consists of three representatives from each state, but each state ". . . shall have but one vote in the Administration and every decision, authorization or other

action shall require unanimous vote." (Article VIII-D) While a representative of the United States chairs the Administration, he has no vote. (Article VIII-C)

Only two specific remedies for alleged Compact violations are provided for in the Compact. It provides that violations shall be "promptly investigated" by the Administration, although the procedure for the investigation and any remedies still require agreement between the states. (Article VIII-H) In addition, disputes "may," by unanimous vote, be referred for arbitration. (Article VIII-D) Both parties agree that the exhaustion test under the circumstances involved here is whether a state has made a "reasonable effort" to proceed first through the Compact Administration. Colorado also acknowledges that it is proper to seek judicial relief if an investigation by the Administration reaches an impasse. (Colo. Br., p. 21) Colorado, as part of its Motion, filed four large volumes of Appendix documents, going back several years, which appear to include the Compact Administration record with respect to post-Compact well development and the operations of Trinidad Reservoir. Both parties relied upon this record in their briefs and arguments.

Kansas argues first that the exhaustion issue was actually decided by the United States Supreme Court when it authorized the filing of Kansas' Complaint. Kansas moved to file its Complaint on December 16, 1985, alleging that the State of Colorado and its water users had materially depleted the usable and available stateline flows of the Arkansas River in violation of the Compact. Kansas further alleged that Colorado had blocked Kansas' efforts to have the Compact Administration investigate its complaints.

On February 18, 1986, Colorado filed a brief in opposition to Kansas' Motion for Leave to File Complaint. The thrust of that brief was that Kansas had not made a "reasonable effort" to resolve its complaints through the Compact Administration, and that absent such an effort,

the Supreme Court should decline to hear the matter. (p. 1) Colorado stated that the question presented was whether Kansas had met its burden "... to demonstrate that a pending investigation of the Arkansas River Compact Administration is not an adequate means to vindicate its allegations of Compact violations." (p. 3) In its brief, citing certain documentary evidence, Colorado alleged that there was a "pending investigation" by the Compact Administration, that the Administration was not deadlocked or unable to act, and that Colorado had not refused to investigate Kansas' allegations. (pp. 8-9) However, Colorado did not file with the Supreme Court the same voluminous administrative record used to support its Motion before the Special Master.

In response to Colorado's brief, Kansas on March 3, 1986 filed a new motion in the alternative, either for leave to file its complaint, or to compel an investigation by the Compact Administration pursuant to Article VIII-H. In its supporting brief, Kansas outlined in further detail its view of efforts taken within the Compact Administration, and the alleged frustration of the administrative procedure. Thus, the question of whether the administrative process had been properly exhausted was clearly an issue in the pleadings before the Supreme Court.

The Supreme Court's Order stated simply:

"The motion for leave to file a bill of complaint is granted. Defendant is allowed sixty days within which to file an answer."

Kansas contends that the Court made a choice between the alternatives presented in its Motion, and thereby disposed of the exhaustion issue. Colorado, on the other hand, argues that the Court's silence is not a basis for inferring intent, and had the Court intended to decide the exhaustion issue, it would have ordered argument and decided the issue explicitly.

The requirement of a motion for leave to file a complaint and the requirement of a brief in opposition do enable the Supreme Court to dispose of matters at a preliminary stage. (*Ohio v. Kentucky* (1973) 410 U.S. 641, 644) As the Court has explicitly recognized, its objective in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presents. (*Id.*) To this end, the Court has strongly suggested that granting an original plaintiff's motion for leave to file complaint amounts to a rejection of arguments that the case should be dismissed. (*Maryland, et al. v. State of Louisiana* (1981) 451 U.S. 725, 740, fn. 16) Further, in the analogous case of *Texas v. New Mexico* (1983) 462 U.S. 554. the Court intimated that "fundamental structural considerations," such as an interstate compact that accords each signatory state the power to veto authoritative commission action, may abbreviate inquiry into the question of whether an available remedy exists at the administrative level. (462 U.S. 54, 568-570)

It is not necessary, however, to decide Colorado's present Motion on the basis of the Supreme Court order. The Special Master is convinced that Kansas did make a reasonable effort to pursue its complaints through the Compact Administration, but because of the inherent limitations in that procedure, the parties reached an impasse. Indeed, the briefs and oral argument on the Motion dealt primarily with the substance of the efforts before and by the Compact Administration, and not upon the Supreme Court order.

First, with respect to post-Compact well development, Kansas cites numerous law reviews and other secondary sources to show that unregulated well development, and its impact on surface water users, has been a problem for many years. (Kan. Br., pp. 30-31) By 1983 Kansas began its own study of the decline in flows of the Arkansas River, and the development of upstream wells in Colorado as a possible cause. Completed in 1984, that study concluded that for the

period 1974 to 1981 a conservative estimate of the stateline depletions due to post-Compact wells in Colorado was 40,000 to 50,000 acre-feet per year. (Appendix Exh. 21, p. iii) Colorado and the Compact Administration were aware of that study. Nonetheless, Colorado contends that Kansas did not formally seek a Compact investigation of this issue until February of 1985. (Colo. Closing Br., pp. 21, 27) Assuming that to be true for purposes of this Motion, there is no question that on March 28, 1985 the Compact Administration directed a formal investigation of the depletion of stateline flows. A number of potential causes were to be investigated, including specifically "well development of the waters of the Arkansas River in Colorado," as well as "the operation of the Trinidad Dam and Reservoir project." (Appendix Exh. 28, attached Exh. L)

The Compact Administration Resolution directed that the investigation be undertaken by a committee consisting of the Director of the Colorado Water Conservation Board and the Chief Engineer of Kansas, or their respective designees. Thus, the same unanimity requirements that limited the Administration itself were carried over into the structure of this investigation. Finally, the March 28 Resolution called for the investigation to be completed by the next annual meeting of the Compact Administration on December 10, 1985.

The engineers for the two states met promptly, but were unable initially to agree upon a scope of work for the investigation. (Appendix Exh. 29) At their next meeting they agreed to defer consideration of a complete scope of work, and defined instead a preliminary scope that included the compilation of certain data and construction of a series of mass diagrams. (Appendix Exh. 30, p. 2) The mass diagrams were presented at their meeting on July 12, 1985, but again the two engineers were unable to agree "about what the diagrams did or did not show." (Appendix Exh. 32, p. 4) Finally they decided to prepare and exchange separate reports analyzing the mass curves, and recommended that

the Compact Administration hold a special meeting on October 8, 1985 to receive such report as the committee might be ready to make. (*Ibid.*) The committee met once again on September 17, "... but was unable to agree on the conclusions to be drawn from the single and double mass diagrams and on what further investigation, if any, should be undertaken." (Appendix Exh. 34, pp. 4) J. William McDonald, the Colorado representative on the committee, reported to the Compact Administration that the committee had "reached an impasse" at its September 17 meeting. (Appendix Exh. 36, p. 2)

Against this background, the Compact Administration met on October 8, 1985. The Colorado representative acknowledged that there had been a "substantial decline in usable stateline flows starting in 1974." (Appendix Exh. 36, p. 4) However, he did not see post-Compact well development as the cause. He stated:

"It seems to me that all the engineering shows thus far is that there has been a decline in usable stateline flows starting in 1974, which corresponds it appears to me, to a decline in tributary inflow rather than to well development or any other beneficial development in the Arkansas River basin in Colorado." (Appendix Exh. 37, p. 32)

Colorado therefore took the position that the investigation should first examine neither the well issue nor the operations of Trinidad Reservoir, but (1) reduced diversions by ditches in Colorado Water District 67; (2) the operating plan for John Martin Reservoir; (3) decreased plains precipitation; and (4) soil conservation measures. (Appendix Exh. 37, p. 35)

With respect to well development, the Colorado representative stated:

"In that context I do not believe it is appropriate to launch an investigation of well pumping in Colorado as David (David Pope, Kansas State Engineer) has urged in his second report until we have determined whether the declines in usable stateline flows might be the result of other causes, which I believe to be more likely than the causes which David has addressed. . . . And it has been my position therefore that the investigation should indeed continue, but it should start first with those factors which at this point in time appear to be most likely explanations for the decline in usable stateline flows." (Appendix Exh. 37, pp. 31-32)

Kansas, on the other hand, urged that the investigation proceed to examine ten possible causes for the decline in stateline flows, including all those suggested by Colorado, and including well development and the operations of Trinidad Reservoir. (Appendix Exh. 37, pp. 35-36) The Compact Administration finally adopted a Resolution that the committee continue its investigation only of those matters mutually agreed upon, that is, the four items suggested by Colorado. (Appendix Exh. 37, pp. 37-38)

Colorado now argues that it did not "rule out" an investigation of the impact of post-Compact wells on stateline flows, but neither did it commit that Kansas' complaints would ever be investigated. (Colo. Closing Br., p. 28; Appendix Exh. 37, p. 33) The facts are that in March the Compact Administration directed an investigation of post-Compact well development and the operations of Trinidad Reservoir, as possible causes among others for the decline in stateline flows. The investigation was to have been completed within the year. Yet by October, at Colorado's insistence, those two matters had been dropped from the

committee's investigation agenda. Kansas had a right to have its complaints "promptly investigated" and not side tracked by Colorado's belief that other factors might have more likely caused the decline in stateline flows. (Article VIII-H)

The well issue came up again at the Compact Administration's annual meeting on December 10, 1985. Kansas asked Colorado directly whether it would be "... willing to immediately begin a prompt and expeditious investigation of post-Compact alluvial well development in the Arkansas River Basin in Colorado. (Appendix Exh. 39, p. 107) Kansas never received an affirmative reply.

At that meeting, Kansas also presented a report from the nationally known consulting firm of S. S. Papadopoulos and Associates. The report concluded that the investigation methodology proposed by Colorado, namely, focusing first on separate factors like climatic conditions, would not "produce meaningful conclusions regarding the alleged violations"; that the various possible factors must be examined contemporaneously, "regardless of preconceived notions as to the relative effects of any one factor"; and that studies had demonstrated that ground-water development and reservoir regulation "impact significantly the streamflow conditions within the river system," and "must be included" in order properly to investigate Kansas' allegation. (Appendix Exh. 39, Exh. E, pp. 5-6)

Kansas filed its motion with the Supreme Court six days later on December 16, 1985, having previously announced after the October 8 meeting that the States were at an impasse, and that such an action was being prepared. (Appendix Exh. 38)

Turning now to the operations of Trinidad Reservoir, Colorado concedes that Kansas first complained about this issue in 1980. (Colo. Br. pp. 9, 24) Through an administrative practice known as "rollover," Kansas alleged that additional

water was stored in Trinidad Reservoir, in violation of the Compact. The Administration found that the amount involved for 1979 was 18,290 acre-feet. (Appendix Exh. 13) At a Compact Administration meeting in 1980, Kansas sought to have the Administration recommend that the State Engineer of Colorado order the release of such stored water, but Colorado voted "no." (Appendix Exh. 13, Colo. Br. p. 9) The rollover practice was continued, and Kansas contends that by 1982 some 58,514 acre-feet of water had been illegally stored. (Kansas' Response, p. 27) Admittedly, Kansas sought arbitration of this issue in 1982, in 1983 and again in 1985. (Appendix Exh. 16, pp. 78, 87; Exh. 28, pp. 168-170) Colorado declined, due to the "failure of the State of Kansas to identify the underlying factual basis for its claims." (Appendix Exh. 16, pp. 88, 85)

In 1983, therefore, Kansas undertook its own study, hiring Simons, Li & Associates, Inc. That study was completed in February, 1984 and concluded in part:

"Since 1979, the Trinidad Project has been operated in a manner different than that envisioned by the Bureau of Reclamation and that approved by the Compact Administration. It is estimated that these deviations in the Trinidad Project operation have caused an additional 26,000 to 35,000 acre-feet of depletions to downstream water users." (Appendix Exh. 21, p. iii)

As previously indicated, the Trinidad issue was finally included as part of the investigation authorized by the Compact Administration on March 28, 1985. However, like the well development issue, Trinidad was dropped on October 8, 1985.

Colorado's principal argument with respect to Trinidad Reservoir is that reservoir operations are currently being reviewed and analyzed by the United States Bureau

of Reclamation. Colorado claims that the Bureau's study, which was begun in 1984, embraces all of Kansas' complaints. The study was requested by the Compact Administration following the Simons, Li report, but was also independently required as part of a five-year review procedure. The Bureau's final report is expected at any time. Two draft reports have been issued earlier, and Kansas maintains that there are both "methodological and legal objections" to the last draft. (Kansas Response, p. 29) However, the scope and efficacy of the Bureau's study are not the issue. There is nothing to show that a routine, though timely, study by the Bureau constitutes a Compact investigation. Indeed, the Compact administration presumably would not have included the operations of Trinidad Reservoir within its March 28, 1985 investigation if the Bureau's study had been intended to serve that function. The Bureau's study may provide valuable data on the issue, but it is not a substitute for action by the Compact Administration to investigate Kansas' complaints.

The decline of Arkansas River flows into Kansas appears to be admitted. At issue are the cause or causes, and whether Compact violations are involved. Kansas has made good faith allegations of such violations, and has presented preliminary studies to support its position. Certainly the future effectiveness of the Compact Administration requires timely resolution of these allegations. However, the Administration structure is such that even a preliminary investigation of the allegations has not proceeded. By exercising its veto on the Commission, though done in good faith, Colorado has effectively prevented "authoritative Commission action." (cf. *Texas v. New Mexico*, *supra*, 462 U.S. 554, 568)

The Special Master believes that Kansas has met its obligations under the law, and that returning these issues to the Compact Administration would not prove effective,

nor would further delay be fair. Accordingly, Colorado's Motion is hereby denied.

DATED: October 21, 1988

/s/ Arthur L. Littleworth

Arthur L. Littleworth
Special Master